No. 2420

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COPPER COMPANY (a corporation),
Plaintiff in Error,

vs.

J. E. REARDON, Administrator of the Estate of Frank Whitsett, Deceased,
Defendant in Error.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

BRIEF FOR PLAINTIFF IN ERROR.

C. H. WILSON,
Attorney for Plaintiff in Error.

Filed this.....day of September, 1914.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR PLAINTIFF IN ERROR.

This is an action brought to recover damages for wrongful death. At the time of the death complained of, March 9th, 1909, the defendant corporation was engaged in the business of mining and operating a quartz mine situate in the County of Shasta, State of California.

The deceased and his twin brother, Fred Whitsett, were employed by the defendant to operate a

Burleigh drill in its mine. Frank, the deceased, was an experienced miner and was known as a machine man (Record, pp. 68, 87 and 88). Fred was a machine man's helper, or chuck tender (Record, p. 78), and had worked for the defendant as a miner during a period of six weeks prior to the accident (Record, p. 81). The Burleigh drill is a machine operated by compressed air that drills holes in rock or ore preparatory to blasting. The machine man operated the valve that let the compressed air into the machine and by means of a screw, turned by a crank, kept the point of the drill in contact with the rock or ore (Record, p. 83). The chuck tender was required to take a drill out of the chuck whenever necessary and put in another, and he was also required to pour water into the hole made by the drill while it was in operation (Record, p. 84). These two brothers changed about in their work from time to time, so that they alternately worked as drill man and chuck tender (Record, pp. 83, 84). At the time of the accident Fred was operating the drill and Frank was the chuck tender (Record, p. 79). Ordinarily, a round of a dozen holes was drilled, four at the top, four in the middle, and four at the bottom of the face of the drift or cross-cut, the bottom four being called lifters (Record, p. 81). When the drilling was completed the holes were filled with dynamite and there was a cap and fuse for each hole. As the men went off shift, the fuses were lighted and by the time the men had reached places of safety, the

explosion took place, blasting the rock out roughly in the shape of the drift or cross-cut (Record, p. 82). A month or more prior to the accident a drift or tunnel had been cut in the mine, and from this drift or tunnel a cross-cut was being made by the Whitsett brothers and their opposite shift at the time of the accident (Record, p. 90). In the face of the cross-cut one round of holes had been drilled and blasted, breaking the rock out to a depth of three or three and one-half feet. This first blast had taken place some time before the Whitsett brothers went to work at the cross-cut (Record, p. 87), and they were, therefore, engaged in drilling the second round of holes at the time of the accident (Record, pp. 107 and 110). The first work that the Whitsett brothers did at this place was on the night preceding the accident, when they drilled five holes. They then went off shift and in due time the day shift came on work—the defendant worked but two shifts in its mine. The drilling was continued by the day shift, so that when the Whitsett brothers went to work on the night shift following, there were but two holes and a part of a third yet to drill. These were the lifters (Record, p. 81). The Whitsett brothers began work on the uncompleted hole, and, as they were drilling the same, the drill struck and exploded a missed-shot or missed-hole, that is to say, a charge of dynamite that had not been exploded in the preceding blast. In this explosion Frank was killed and Fred was greatly injured. This action, as has been stated, is brought

to recover damages for the death of Frank. Fred maintains his separate action to recover damages for his injuries (see Record on Appeal in Case No. 2419, before this Court).

The complaint charges that the defendant "failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for the said Frank Whitsett to perform his said labor as aforesaid, and particularly in this:" And here follows a description of the accident and then the allegations that the presence of the unexploded blast was unknown to Frank Whitsett, but could have been discovered and known to the defendant by the use and exercise of ordinary care and diligence (Record, p. 29).

Defendant admits the accident and death, but denies the negligence, and denies that it could have discovered and known of the missed-shot.

The case was joined with that of Fred Whitsett for trial, both cases being tried before the same jury. This case resulted in a verdict in favor of the plaintiff and against the defendant in the sum of thirty-five hundred dollars ($3500.00). Separate motions for new trial were duly made and denied, and separate writs of error to the Court below were duly obtained and both cases are now before this Court on writs of error. In the Court below the main issue was whether or not the accident was proximately caused by any negligence on the part of defendant, plain-

tiff contending that it was the duty of the defendant to exercise ordinary care to discover the missed-shot, while the latter insisted that under the circumstances there was no duty on its part to furnish deceased with a safe place in which to work, and that the duty of looking for and detecting the missed-shot rested on the deceased, and furthermore, that the missed-shot in this instance was so concealed that it was impossible by any ordinary or practicable method to discover the same.

Before this Court the plaintiff in error relies on the following

SPECIFICATIONS OF ERROR,

which are urged by it as grounds for the reversal of the judgment of the District Court:

I.

That the District Court erred in permitting counsel for the plaintiff to state, in the presence of the jury: "In this case, there is certain indemnity insurance against this kind of action, and the insurance company is defending through its own counsel, this action. Therefore, I have a right to inquire." And that counsel for plaintiff was guilty of misconduct in making said statement in the presence of the jury. That defendant objected to said statement and to the conduct of counsel in making said statement, which objection was overruled by the Court and the defendant then and there excepted thereto, which exception was duly allowed by the

Court, constituting the First Assignment of Error (Record, pp. 164, 165).

II.

That on May 15th, 1912, and while the jury was being empaneled in the above entitled action during the examination of N. S. Arnold, a talesman, on his *voir dire* by counsel for plaintiff, the following proceedings were had:

> "Mr. CANNON. Q. Have you any connection, either as a stockholder or otherwise, with an indemnity company or organization for the purpose of insuring people against personal injuries?
>
> Mr. WILSON. I object to that question as immaterial.
>
> Mr. CANNON. I do not think it is immaterial. I would like to state why I ask the question.
>
> The COURT. What is the reason?
>
> Mr. CANNON. The reason is——
>
> Mr. WILSON. I object to the reason being stated.
>
> The COURT. I am asking for it.
>
> Mr. CANNON. In this case there is certain indemnity insurance against this kind of action and the insurance company is defending, through its own counsel, this action. Therefore, I have a right to inquire.
>
> Mr. WILSON. I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.
>
> Mr. WILSON. We now move that the jury be discharged on the ground that improper and foreign matter has come to the knowledge of the jury.
>
> The COURT. The motion will be denied. I will instruct the jury to pay no attention to

the remark of counsel unless it should appear it is a pertinent fact."

That the Court erred in refusing to discharge the jury on motion of defendant's counsel, constituting the Second Assignment of Error (Record, pp. 165, 166).

III.

The following question was then propounded to said N. S. Arnold, a talesman, on his *voir dire:*

"Mr. Cannon. Q. Have you any connection, either as a stockholder or otherwise, with any indemnity company as I have described?
Mr. Wilson. We insist upon our objection.
The Court. I overrule the objection.
Mr. Wilson. I will take an exception."

That the Court erred in permitting said question and in allowing counsel to bring before the jury notice and information of the fact that this action was defended by an indemnity company and that defendant was protected by indemnity insurance, constituting the Third Assignment of Error (Record, p. 166).

IV.

The following question was then propounded to the witness, Fred Whitsett:

"Q. What was the condition of your father and mother with reference to their financial condition and their health and ability to earn money generally?
A. They were very poor."

Defendant objected to this question and answer as irrelevant, incompetent and immaterial, not the proper proof of damages in the case, calling for the conclusion of the witness, and on the grounds shown in the California case of *Johnston v. Beadle.*

Objection was overruled and the defendant then and there excepted thereto.

That the court erred in allowing said witness to answer said question, constituting the Fourteenth Assignment of Error (Record, p. 171).

V.

That thereupon defendant made its motion for a nonsuit, as follows:

> "Mr. WILSON. And in the Reardon case we move that an order of nonsuit be entered upon the ground that the plaintiff has failed to substantiate the allegations of negligence in this case. Further, upon the ground that the evidence fails to show any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; and further, upon the ground that it does not appear from the evidence in this case that the defendant negligently or carelessly omitted or failed to furnish the deceased, Frank Whitsett, with a safe place in which to perform his work."

Constituting the Twenty-seventh Assignment of Error (Record, p. 86).

VI.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should

give to the jury the following instruction (the same being numbered 1 of the instructions requested by the defendant):

> "You are instructed by the Court that on the evidence and under the law, you will return a verdict in this case for the defendant."

Which request was refused, to which ruling the defendant then and there excepted.

That the Court erred in refusing to give such instruction, constituting the Fortieth Assignment of Error (Record, pp. 185, 186).

VII.

That the District Court erred in overruling and denying the petition of defendant for a new trial herein, to which ruling the defendant duly excepted.

That the Court erred in denying said petition for a new trial, constituting the Fifty-seventh Assignment of Error (Record, pp. 201-215).

VIII.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 31 of the instructions requested by the defendant):

> "If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine where he was engaged

to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted, the error of the Court in refusing to so charge the jury constituting the Forty-ninth Assignment of Error (Record, pp. 193, 194).

IX.

On the close of the testimony and before the jury retired for deliberation, the Court gave its certain instructions to the jury, and when said instructions of the Court were so given to the jury, and before the jury was retired for deliberation the defendant duly excepted to the action of the Court in instructing the jury as follows:

"In this connection, however, you will bear in mind that if you find that the defendant, in operating the mine in question, provided an inspector called a 'missed-hole man', and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the succeeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck-tender

> regularly set at work by his superior at any place where it was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, and to act upon that assumption, and would not be guilty of negligence for failing to make such inspection himself."

Upon the ground that the same is contrary to law.

That the error of the District Court in so charging the jury now constitutes the Fifty-third Assignment of Error (Record, p. 197).

X.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 26 of the instructions requested by the defendant):

> "In the case brought by Reardon, for the death of Frank Whitsett, there is no charge in the complaint that the accident was proximately caused by the incompetence of Yokum or of a missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or, if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed-shot detective or of the deceased in that case, then your verdict must be for the defendant."

Which request was refused, to which ruling the defendant then and there excepted.

That the District Court erred in refusing to so instruct the jury, now constituting the Forty-eighth Assignment of Error (Record, p. 193).

XI.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 8 of the instructions requested by the defendant):

> "I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses."

Which request was denied, and to which ruling the defendant then and there excepted.

That the District Court erred in refusing to so instruct the jury, now constituting the Forty-fourth Assignment of Error (Record, p. 188).

XII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the

same being numbered 9 of the instructions requested by the defendant):

> "It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employee knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers."

Which request was refused, to which ruling the defendant then and there excepted.

That the District Court erred in refusing to so instruct the jury, now constituting the Forty-fifth Assignment of Error (Record, p. 189).

Argument.

I.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR.

These specifications of error pertaining to the alleged misconduct of counsel for plaintiff in stating in the presence of the jury that this action is defended by an insurance company, may be considered together.

The record shows that during the examination by Mr. Cannon of N. S. Arnold, a talesman, on his *voir dire,* and who subsequently sat as a juror in this cause, the following proceedings were had:

"Q. Have you any connection either as a stockholder or otherwise with an indemnity company, or organization for the purpose of insuring people against personal injuries?

Mr. WILSON. I object to that question as immaterial.

Mr. CANNON. I do not think that it is immaterial. I would like to state why I asked the question.

The COURT. What is the reason?

Mr. CANNON. The reason is——

Mr. WILSON. I object to the reason being stated.

The COURT. I am asking for it.

Mr. CANNON. In this case there is certain indemnity insurance against this kind of accident, and the insurance company is defending, through its own counsel, this action; therefore, I have a right to inquire——

Mr. WILSON. I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

The COURT. I will develop what the fact is; I will instruct the jury that they pay no attention to anything of that kind. I am bound to know the theory on which the question is asked, when it is objected to, especially. That is why I asked the reason.

Mr. WILSON. We insist on the error.

The COURT. You have your right to reserve your exception. I overrule your objection.

Which ruling defendant now assigns as

Error No. 1.

Mr. WILSON. We now move that the jury be discharged on the ground that improper

and foreign matter has come to the knowledge of the jury.

The COURT. The motion will be denied. I will instruct the jury to pay no attention to the remark of counsel, unless it should appear it is a pertinent fact.

Which ruling defendant now assigns as

Error No. 2.

Mr. CANNON. Q. Have you any connection, either as a stockholder, or otherwise, with any indemnity company such as I have described?

Mr. WILSON. We insist upon our objection.

The COURT. I overrule the objection.

Mr. WILSON. I will take an exception.

The COURT. They have a right to inquire into facts of that kind. It might affect a juror's fairness, and it might turn out that some of them were stockholders in some such company.

Mr. WILSON. The Supreme Court of this State has decided otherwise.

The COURT. The objection is overruled.

Which ruling defendant now assigns as

Error No. 3."

(Record, pp. 56-58).

Reduced to a simple proposition, the objection is that Mr. Cannon stated, in the presence of the jury that heard and determined this case, that the defendant was indemnified by insurance and that the insurance company was defending the case through its own counsel. These facts could not have been proved by him in the course of the trial, and it was misconduct for him to inform the jury of them. The Court, instead of then and there instructing the jury to disregard these matters, stated that it would develop the facts and

that it would instruct the jury to pay no attention to the same, unless they should appear as pertinent facts.

No evidence was introduced on the subject and it did not appear in the evidence or otherwise, except through the statements complained of, that the defendant is insured and that the insurance company is defending this case. The facts were not made to appear pertinent. Notwithstanding, the Court, overlooking its promise, wholly failed and neglected to instruct the jury relative to the matter. Defendant's counsel, of course, had a right to rely upon the promise of the Court in that particular, and the obvious misconduct of counsel, coupled with the neglect of the Court, prejudiced the defendant to the extent that its demands for a new trial must be granted.

It is reversible error for counsel to bring to the attention of the jury, at any time or in any manner, the fact that the defendant is insured as against the accident sued on, and in that connection, I beg to refer to the case of

Eckhart etc. Co. v. Schaeffer, 101 Ill. App. 500.

In that case, in the examination of the jury, one of the veniremen was asked if he was connected with the Fidelity and Casualty Company, and thereupon plaintiff's counsel said: "I may state, gentlemen, that the Fidelity and Casualty Company are defending this case." On the examination of another juryman, a similar statement

was made by counsel for plaintiff, and then addressing counsel for defendant: "You are the attorney for the Fidelity and Casualty Company, are you not?" And, after objection: "I mean in this particular case he is the attorney for the Fidelity and Casualty Company." And again: "Mr. Dynes, isn't it a fact that the Fidelity and Casualty Company will pay any judgment rendered in this case?" And again: "Do you know Mr. Dynes here, who sits here, the attorney for the Fidelity and Casualty Company?" And again: "Now, this case is defended by the Fidelity and Casualty Company." And again: "Do you know their attorney here, Mr. Dynes or Mr. Williams?" The Court in its opinion, says:

> "It sufficiently appears from the foregoing that the attorneys for the plaintiff (appellee here), not satisfied with asking jurors whether they knew any one connected with the Fidelity and Casualty Company, which question they had the right to ask, for the purpose of a peremptory challenge, and which was not objected to, proceeded further, and stated to the jurors that the Fidelity and Casualty Company was defending the case, and also stated that Mr. Dynes, who is appellant's attorney, was the attorney of the Fidelity and Casualty Company in this case in the trial court. And the court, by overruling the objections of appellant's attorneys to such statements, stamped the statement with the court's approval, so that they went to the jury with all the force and effect of evidence. Mr. Dynes was the attorney of record for appellant and the Fidelity and Casualty Company was not a party to the record. If it were a fact that the Fidelity

> and Casualty Company was defending the suit, it would not be competent to prove that fact, for the plain reason that such proof would not tend, in any degree, to sustain the issues; it would be totally irrelevant. It is, therefore, plain that the attorneys, presumably learned in the law, could not have made the statements in question for any legitimate purpose, and while we will not say that they were made for an illegitimate purpose, and to prejudice the jury, we are of opinion that they were well calculated to have that effect."

And a judgment for the plaintiff was reversed.

The case of

Fuller v. Darragh, 101 Ill. App. 664,

is a similar case. Misconduct was charged against the plaintiff's counsel in telling the jury, at the time of their examination *voir dire*, that he understood that an insurance company was defending the case. And the Court in its opinion, says:

To the proper conduct of jury trials one thing is absolutely essential, viz., a recognition of the principle that at the bar of justice all men are equal.

> "All causes are to be tried; all questions determined upon matters pertinent thereto, and not upon considerations which in the controversy ought not to be mentioned.
>
> "If verdicts are to be rendered or judgments to be given for plaintiffs because they are popular, or their manner of living, business, lineage, association or benevolence commends them to the community, or against defendants for the reason that they hold opinions, advocate ideas or engage in enter-

prises distasteful to many, then is our whole system of jurisprudence a mockery and a delusion.

"None of the learned counsel for appellee will gravely contend that whether appellant had procured insurance against liability for accidents, or whether the suit under consideration was being defended by an insurance company or its attorney, could possibly throw any light upon the question of whether the injury to appellee had been occasioned by actionable negligence of appellant.

"Why, then, should the jury be told that the defense was made by a casualty insurance company? If this can be done, why may not a jury be told that the action is prosecuted by a corporation created to hunt up and prosecute accident cases, or by an attorney for a contingent fee; and that one-half of any verdict rendered for the plaintiff will go to such corporation or to his attorney?

"It is urged that this statement was made for the purpose of selecting a disinterested jury.

"Jurors may be asked if they know certain persons or have business or other relations with them, but under the guise of obtaining a fair jury, information calculated to prejudice jurors against either party cannot be given, and the trial court should not only prevent this, but if satisfied that despite its rulings jurors have thus been swerved in the considerations, should set aside verdicts so obtained.

"If a plaintiff, so unfortunate as to have had a father convicted of horse stealing and a mother of child stealing, comes into court asking that there be rendered to him what he believes to be his due, jurors cannot be

asked if they know his father, lately sentenced for larceny, or his mother, in the penitentiary for a most heinous offense.

"Counsel had no right to tell the jury that he understood that an insurance company was defending the case."

The case of

Lipschutz v. Ross, 84 N. Y. Supp. 632,

is of the same character. It is said in the opinion in that case:

"The action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff by being struck by a vehicle and horse which were owned by defendant and driven by defendant's employee. The cause came on for trial before one of the justices of the City Court. Twelve talesmen were called to act as jurors in the case, and, after taking their seats in the jury box, and while being examined by counsel for the plaintiff for the purpose of ascertaining whether or not they were acceptable, plaintiff's counsel asked whether any of the jury were interested in the Travelers' Insurance Company of Hartford, Conn. This was objected to, and the objection was overruled. One of the jurymen then stated that he, as an agent of that insurance company, had sold insurance policies. Thereupon, in the presence and hearing of the jurors statements were made by the court and counsel, and exceptions taken thereto as follows:

'PLAINTIFF'S COUNSEL. I want to see whether any of the jury are connected with said insurance company. It now appears that one of the jurors is an agent of this very company, and I understand that this case is being defended by the Travelers' Insurance Company.

'DEFENDANT'S COUNSEL. I think the statement made by the counsel to the effect that he understands there is an insurance company interested in this case is prejudicial to the interests of the defendant in this action, and I ask that the case be withdrawn from this jury, and sent to another for trial.

'The COURT. I will overrule your objection, and give you an exception.

'(Exception taken by defendant's counsel.)

'The COURT. Assuming that an insurance company is interested in this case, I think the plaintiff has a right to find that out.

'(Exception taken by defendant's counsel. The jury was then accepted and sworn.)'

"We are of the opinion that the statements made by the plaintiff's counsel and the court in the presence of the jurors impanelled to try the case were prejudicial to the defendant and constituted error, which requires a reversal of the judgment."

In the case of

Manigold v. Black River Co., 80 N. Y. Supp. 862,

the Court said:

"The law is well settled that it is improper to show in an action of negligence that the defendant is insured against loss in case of a recovery against it on account of its negligence. This was expressly held in the case of *Wildrick v. Moore,* 66 Hun. 630 (22 N. Y. Supp. 1119). *It is not proper to inform the jury of such fact in any manner.* It is not material to any issue involved in the trial of the action, and certainly plaintiff's counsel ought not to be permitted to do indirectly what he would not be permitted to do directly."

The case of

Lone Star etc. Co. v. Voith (Tex.), 84 S. W. 1100,

was reversed because of the persistent efforts of plaintiff's counsel, from the beginning to the close of his argument, to get before the jury the fact that the defendant was insured by such insurance company against loss by reason of plaintiff's injuries.

A similar case is that of

Coe v. Van Why, 33 Colo. 315; 80 Pac. 894.

See also:

Casselmon v. Dunfee, 172 N. Y. 507;

Barrett v. Bonham Oil Co. (Tex.), 57 S. W. 602;

Iverson v. McDonnell, 36 Wash. 73; 78 Pac. 202;

Sawyer v. Arnold Shoe Co., 90 Me. 369; 38 Atl. 333;

Waldrick v. Moore, 22 N. Y. Supp. 1119;

Gass etc. Co. v. Robertson (Ind.), 100 N. E. 689;

Van Buren v. Mountain Copper Co., 123 Fed. 61;

Roche v. Llewellyn Iron Works, 140 Cal. 574.

The case at bar comes squarely within these authorities. Mr. Cannon, most learned in the law, and, particularly, in the law of negligence cases, must have known that no evidence could be intro-

duced on the trial for the purpose of showing that the defendant is indemnified against any judgment that plaintiff may obtain in this case, yet, he forced the way to make a statement to that effect before the jury. Such information, so conveyed to the jury, could have had but one purpose,—the sinister purpose of prejudicing the jury against the defendant. The trial Judge, instead of promptly instructing the jury to disregard all the facts so stated by Mr. Cannon, declared that he would instruct "the jury to pay no attention to the remark of counsel, *unless it should appear to be a pertinent fact.*" This did not appear. The Judge did not "instruct the jury to pay no attention to the remark of counsel." The jury were left to conclude that the insurance was a fact and that that fact was pertinent to the case. The matter went to the jury with all the force and effect of evidence, emphasized by the objection and discussion, and stamped with the approval of the Court. The error is more glaring and prejudicial than those complained of in the cases above cited.

II.

THE FOURTEENTH ASSIGNMENT OF ERROR.

On the examination of the witness, Lawrence Whitsett, he was asked by plaintiff's counsel:

> "Q. What was the condition of your father and mother with reference to their financial condition and their health and ability to earn money generally?"

This question was objected to on the ground that it was irrelevant, incompetent and immaterial and not the proper proof of damages in the case, and calling for the conclusion of the witness. Mr. Cannon then stated:

> "I will modify the question. What was the financial condition of your parents at the time of the death of one brother and the injury to the other?"

To which the same objection was interposed. The objection being overruled, the witness answered:

> "They were very poor. My brother Frank had contributed to their support since he was big enough to work for wages" (Record, pp. 67 and 68).

The financial situation and standing of the parties to a suit are wholly irrelevant. The amount of damages depends upon circumstances wholly independent of the wealth or poverty of the parties. The learned Judge of the District Court, while an Associate Justice of the Supreme Court of the State of California, decided the case of

Green v. Southern Pac. Co., 122 Cal. 564,

where he said:

> "The trial court very clearly committed prejudicial error in admitting before the jury, over defendant's objection, the testimony of the witness Hayes, to the effect that the plaintiff Salona Green, one of the daughters of deceased, who was living with him at his death, had no property of her own upon which to maintain herself. This evidence had no pertinent or competent bearing upon the extent

> of injury suffered by plaintiffs, for which defendant could be held responsible, and its only effect and inevitable tendency was undoubtedly to excite the sympathies of the jury and improperly influence their finding upon the question of damages. Such evidence is never admissible in a case of this character, for the very simple reason that the extent of a defendant's responsibility for the results of his negligence is not to be measured by the condition as to affluence or poverty of the injured party at the time of suffering the injury, since that is a condition for which the defendant is in no way responsible; and as suggested by this court in *Mahony v. San Francisco etc. Ry. Co.,* 110 Cal. 471, 476, in discussing the same question: 'Such testimony could have been offered for no other purpose than to create prejudice, and should have been excluded.' (See, also, *Malone v. Hawley,* 46 Cal. 409; *Chicago etc. R. R. Co. v. Johnson,* 103 Ill. 512; *Pennsylvania Ry. Co. v. Roy,* 102 U. S. 451; *Central R. R. Co. v. Moore,* 61 Ga. 151.)"

In addition to the cases cited by the learned Judge in the above quotation, see:

Johnston v. Beadle, 6 Cal. App. 253;
Shea v. Railway, 44 Cal. 414-429;
National Biscuit Co. v. Noland, 138 Fed. 6-9.

On the motion for new trial it was argued that the evidence in question was admissible under the provisions of Section 1970 of the Civil Code. That section provides that when death results from an injury to an employee, received in the manner specified in said section, the personal representative shall have a right of action and may recover

damages "for the benefit of the widow, children, dependent parents and dependent brothers and sisters in the order of precedence as herein stated." Counsel then contended that this action being brought under that section, the word "dependent" as there used, means something more than those who prior to the death received pecuniary assistance from the deceased. In other words, that it means a state of dependence upon the public or any individual or individuals. Such cannot be the meaning of the word as here used, because the purpose of the provision of Section 1970, under consideration, is to provide for a recovery of damages in case of the accidental death of an employee, and in the assessment of damages in all such cases the financial state of the parents is wholly immaterial. It is the law, and the jury were instructed in this case to restrict their damages to the actual pecuniary loss suffered by the father and mother from the death of their son, Frank; that is, the jury were told that "Your verdict should be limited to that amount which the evidence shows that the deceased would have probably earned, and, after paying his own expenses for his food, lodging, clothing and the necessary and ordinary expenses and costs of living, would have given or turned over to his father and mother for their own use" (Record, p. 141). In this connection, therefore, the word "dependent" means "one who relies for support on another in some way", one who has the right to, and who

does look to—depend—upon another for monetary assistance or support.

13 Cyc., 788;

Nye v. Grand Lodge, 9 Ind. App. 131; 36 N. E. 429, 436;

Supreme Council v. Perry, 140 Mass. 580-590;

Ballou v. Gile, 50 Wis. 614-619; 7 N. W. 561-563.

In the case of

Martin v. Modern Woodmen, 111 Ill. App. 99,

the Court, in defining the word "dependent", said:

> "It means dependence for support and maintenance; yet the dependence for support meant by the statute and the by-law need not be complete dependence upon the member for support, but a regular and partial dependence is sufficient to entitle the party to the benefit of the certificate."

So, again, in the case of

Alexander v. Parker, 144 Ill. 355; 33 N. E. 183,

the Court defines "dependence" as:

> "One who is sustained by another, or relies for support upon the aid of another."

This case was affirmed in

Royal League v. Shields, 251 Ill. 250; 96 N. E. 45.

In the case of

Caldwell v. Grand Lodge, 148 Cal. 197,

the Supreme Court of California quoted from the case of

McCarthy v. New England Order, etc., 153 Mass. 314,

as follows:

> "Trivial, casual or perhaps wholly charitable assistance would not create the relationship of dependency within the meaning of the by-laws. Something more is undoubtedly required. The beneficiary must be dependent upon the member in a material degree for support or maintenance or assistance, and the obligation on the part of the member to furnish it must, it would seem, rest upon some moral or legal or equitable ground, and not upon the purely voluntary or charitable impulse or disposition of the member."

While these cases relate to benefit insurance societies and their certificates of membership, the definitions given are applicable to the construction of the statute under consideration. The certificates and statutes relate to money to be acquired by a beneficiary on the death of some person upon whom he is dependent.

Obviously, a party charged with wrongfully committing a personal injury which produces the death of another, cannot be held responsible for the physical or financial handicaps of the parents of the latter which existed before or at the time of the injury and death. Such never has been the rule, and, under the statutes in the different states which sought to remedy the defect of the common law that allowed no right of action to recover

damages for such death, and which are all more or less modeled after Lord Campbell's Act, it has always been held, following the rule laid down by the English Courts, that the damages must be restricted to pecuniary loss, except in those few cases where exemplary damages may be given.

Green v. Southern Pacific Co., 122 Cal. 567;
Burke v. Arcata etc. Ry., 125 Cal. 366.

As we have seen, the witness, Lawrence Whitsett, stated that: "My brother Frank had contributed to their" (meaning his father and mother) "support since he was big enough to work for wages." And the trial Judge instructed the jury that in the estimation of damages, they were to determine the amount of that contribution in the determination of the pecuniary loss sustained by the plaintiffs. This brings the case with Section 1970. "Dependence" is shown. The purpose of the act is accomplished. Why, then, say that the parents are very poor? As said in

Mahony v. San Francisco Etc. Ry. Co., 110 Cal. 476:

> "Such testimony could have been offered for no other purpose than to create prejudice, and should have been excluded."

III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT.

Here in consideration is given to the twenty-seventh assignment of error, which is the order

of the Court denying defendant's motion for a nonsuit (Record, p. 87), the fortieth assignment of error, which is the refusal of the trial Court to instruct the jury to return a verdict for the defendant (Record, p. 185), and the fifty-seventh assignment of error, which is the ruling of the Court denying defendant's petition for a new trial (Record, pp. 200 and 201).

The second amended complaint, upon which plaintiff went to trial, charges in paragraph six that the defendant

> "failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for the said Frank Whitsett to perform his said labor, as aforesaid, and particularly, in this, that on the 9th day of March, 1909, while the said Frank Whitsett was working as a miner, driller and laborer for the said defendant, Balaklala Consolidated Copper Company, in operating a drill at the face of the tunnel in pursuance of said employment and at a place where he was required and directed by said defendant to work, the drill, so operated by him, ran into and exploded a charge of powder, which had been negligently left in said position by said defendant, Balaklala Consolidated Copper Company, and the presence of which was then and at all times theretofore unknown to the said Frank Whitsett. That the said Frank Whitsett was killed by and as a result of said explosion."

The seventh paragraph is as follows:

> "That the unsafeness of the place where the said Frank Whitsett was killed could have been by said defendant, Balaklala Consolidated

> Copper Company, discovered and known by the use and exercise by it of ordinary care and diligence'' (Record, p. 29).

These allegations are denied in the answer (Record, pp. 35 and 36).

Under these pleadings the burden of proving the alleged negligence is on the plaintiff, and there is no presumption of negligence arising from the mere fact of the accident or death.

Sappenfield v. Railway, 91 Cal. 56;
Puckhaber v. Railway, 132 Cal. 364;
Patterson v. Railway, 147 Cal. 183;
Thompson v. Cal. Construction Co., 148 Cal. 40.

The defendant was not an insurer of Frank Whitsett against accidental injury. Its obligation was to use ordinary care, and ordinary care in this connection means such care as prudent employers in the same line of business ordinarily use under the same circumstances.

Sappenfield v. Railway, 91 Cal. 56;
Brymer v. Southern Pacific Co., 90 Cal. 498;
Brett v. Frank & Co., 153 Cal. 272.

And, as indicated in the second amended complaint, the defendant's negligence is to be measured by its knowledge or means of knowledge of the defect complained of.

Sappenfield v. Railway, 91 Cal. 57;
Brymer v. Southern Pacific Co., 90 Cal. 498.

If the defect was such as to deceive human judgment, in other words, if, by the exercise of the ordinary care above mentioned, the defendant did not, or could not, have discovered the defect complained of, then it is not liable.

Thompson v. Cal. Construction Co., 148 Cal. 39;

Malone v. Hawley, 46 Cal. 414.

The jury are not permitted to guess that defendant was negligent or that it could—through any of its officers—have seen an unexploded blast that the workmen themselves were unable to discover.

Puckhaber v. So. Pacific Co., 132 Cal. 366.

The evidence shows that after a blast, a man by the name of Yokum was employed in the shift in which the Whitsett brothers worked; his duties were to use an iron bar for the purpose of prying down,—"barring down",—the loose pieces of rock that had not been broken entirely free by the blast, and also to look for "missed-shots" or "missed-holes", that is to say, those holes that had been loaded with dynamite, and which, for some reason, had failed to explode (Record, pp. 90 and 91). Yokum was employed by the defendant as an extra precaution. Such a man is not ordinarily employed by mining companies under similar circumstances (Record, pp. 118, 119, 121, 125).

If missed-shots were found, they were blasted before further drilling took place. The loose rock,

which resulted from the blast, was cleared away by the "muckers". It sometimes required the work of more than one shift of muckers to clear away the loose rock or muck.

As is obvious, the best time to examine the face of the drift or cross-cut, for the purpose of discovering missed-shots, was after the muck had been removed, but the exigencies of mining sometimes required Yokum, the missed-shot man, to examine the face before the muck had been cleared away (Record, pp. 91 and 115). In such case he would examine as far down as possible, that is to say, as far down as the muck, but it was not his duty to clear away the muck and examine beneath it (Record, p. 92), it being clear from the evidence that it would be a physical impossibility for him to remove the muck in addition to his other duties (Record, p. 91).

In view of the incomplete examination that the missed-shot man was ordinarily enabled to make, it was the duty of the machine men to examine the face of the drift or cross-cut for missed-shots before setting up their machine and beginning drilling operations (Record, pp. 88, 92, 109, 117). There is some conflict in the testimony as to the duty of the machine men in this particular (Record, pp. 125, 126). That the questions of fact arising from this state of the evidence were not properly submitted to the jury is one of the contentions of the defendant, which will receive attention later.

A missed-shot is ordinarily plain to be seen and can be detected without any trouble (Record, p. 92), but it is possible for the rock to so break that it would conceal a missed-shot "and that is why they come at times to miss discovering them, because they are concealed" (Record, p. 108).

Bearing in mind that missed-shots are ordinarily easy of detection, but that sometimes they are so concealed that they cannot be discovered, and bearing in mind the legal principle that it is the duty of every workman to exercise his faculties for self-protection,

Hightower v. Gray (Tex.), 83 S. W. 254-256;
Olson v. McMullen, 34 Minn. 94; 24 N. W. 318;
Crown v. Orr, 140 N. Y. 450; 35 N. E. 648;
Kenna v. Central Pacific, 101 Cal. 29;
Towne v. United Electric Co., 146 Cal. 770;
Russell Creek Coal Co. v. Wells, 96 Va. 416; 31 S. E. 614,

I shall now proceed to show that there is no proof in this case of the allegations contained in the second amended complaint that the missed-shot causing the accident complained of could or should have been discovered and known by the defendant by the use of ordinary care and diligence.

The witness Yokum testified that he examined the face of the cross-cut where the accident occurred after the first blast. His examination was from the top of the cross-cut down to the pile of muck,

but he discovered no missed-shot. He did not know when the muck was removed and did not go back after its removal for the purpose of making further examination, because, he says, that was not his business, but the duty of the machine men (Record, pp. 111, 112, 115, 116, 117). The witness further says that he was at that place about half an hour before the accident. That Frank Whitsett was there alone, starting a hole, or lifter. The hole was in 5 or 6 inches, perhaps, and he seemed to be having trouble with it. The witness helped him line up the machine. The witness did not look for missed-shots at that time, but he did not see any in the neighborhood of the place where the drill entered the face of the cross-cut. While there was muck there, it had been cleaned away "the best they could before they set up." He says: "I did not see any indication of a missed-hole in that vicinity" (Record, p. 116). He further states that it was more or less the duty of everyone in the mine to look for missed-shots; and

> "Q. I will ask you this—Did or did not every miner employed on those premises have to look out for missed-holes?
> A. Why, certainly" (Record, p. 117).

The witness Meyers, who was one of the two shift bosses in charge of the shift in which the Whitsett brothers worked, testified that he was acquainted with the place where the accident happened, and that he directed the drilling machine

to be set up there; that at that time the muck was pretty well cleaned up; that he could see the face tolerably well. That while he did not examine it carefully, he walked up and looked it over and could see no reason why they should not set up there. "I did not discover a missed-shot," he says (Record, p. 107). Again, he testifies: "When I told the Whitsett boys to set up their machine at this place, I did not see a missed-hole in this face, nothing to make me suspicious of anything like that * * * I looked at the face when I set these men up there, and saw nothing" (Record, p. 109). On the night of the accident this witness again visited the place where the Whitsett brothers were working shortly after the shift started (Record, p. 110), and while he does not say that he did not at that time discover a missed-shot, it is only logical to conclude from his testimony that, had he discovered one, he would have stopped the work. He further testified that it is a custom in mining for machine men to look for missed-holes and that they did in this mine. And he says: "That is a thing that is so thoroughly understood among miners, that there is no such thing as duty attached to it and no such thing as instructing them concerning it" (Record, p. 109).

The witness Hall, who was the other shift boss, testified that he saw the place where the accident happened, probably an hour before its occurrence, but that he did not at that time see a missed-shot in the face of the cross-cut (Record, p. 104).

The witness, Lawrence Whitsett, was at the place of the accident for five minutes after his two brothers had begun work there, but he saw no missed-shot (Record, pp. 69 and 92.) He knew the appearance of missed-shots, and he had previously discovered a number in this mine (Record, p. 65).

And the witness Wall testified to substantially the same facts. His work was within thirty feet of the place of the accident. He says he went to get a drink and coming back stopped to talk with the Whitsett boys and remained there probably five minutes. He noticed that the day shift had drilled about five holes, but he does not say that he saw a missed-shot (Record, pp. 72, 75).

Fred Whitsett, the surviving brother, testified that he and his brother reached the place of the accident when they went on shift, probably ten minutes after eight, but that they were obliged to wait for steel drills, and it was ten o'clock before they got the drill working. That when he first went to the place of the accident on that evening he remained probably five minutes, during which time he looked at the holes that had been drilled by the day shift, and saw those that had been previously drilled by his brother and himself. He then went for the drills, returning about ten o'clock, when he took out the old drill and put a new one in the machine. In order to do this, he was obliged to stoop over and his face came within a foot of the face of the cross-cut and about eighteen

inches from the ground, and he could see the face of the wall perfectly (Record, p. 84). He was in close proximity to the unexploded blast but did not see it.

While he states in one part of his testimony, that he did not know the appearance of a missed-shot, his entire evidence does not sustain this denial, as he says that he had assisted in loading dynamite into the holes at various times, and that on top of the dynamite they sometimes placed a little mud; that there was a cap and fuse, the latter sticking out of the hole. He, therefore, knew the appearance of a hole loaded and ready to blast, and he states that a missed-hole is a loaded hole that has not gone off; consequently, he must have known what a missed-shot looked like. Further he says that he knew that missed-shots sometimes occurred, and, finally, on cross-examination, he was asked:

"Q. You have seen a missed-hole, of course?
A. I don't remember whether I did or not.
Q. You don't know whether you ever did or not?
A. No, sir" (Record, pp. 82-85).

While there is a conflict in the testimony as to whether or not it was the duty of Fred Whitsett, a chuck tender, to look for missed-shots, it is certain from his testimony that he did not discover a missed-shot, or anything to excite his suspicions, at the place of the accident, and it is equally cer-

tain that he had a very good opportunity of discovering anything unusual or suspicious about his place of work.

Frank Whitsett remained at the place of the accident from ten minutes past eight until ten o'clock. We do not know how he occupied his time, except that the witness Yokum says that he was at the place about half an hour before the accident; that Frank Whitsett was there alone, starting a hole or lifter. Yokum helped him line up the machine. At that time the muck had been cleaned out (Record, p. 116). Frank was an experienced miner and is presumed to have known about missed-shots and their appearance. If there had been a missed-shot observable, it is certain that Frank would have seen it.

From all the testimony quoted, it is apparent that missed-shots are of two classes: First, those that are readily seen as soon as the muck is cleared away; and, second, those that are so hidden that they cannot be discovered by the exercise of any reasonable degree of care. It is further obvious that the missed-shot in this particular case belonged to the latter class, and that none of these witnesses were able to discover it. It does not appear from the evidence that any precaution, usually taken by miners in such cases, was omitted.

How, then, could the defendant, who must act through its employees, in the exercise of ordinary care, have discovered a missed-shot that deceived so many?

If it was so hidden as to be undiscoverable by the exercise of ordinary care by those whose duty it was to discover the same, there can be no recovery, because the case is lacking in an essential element. It is, as we have seen, necessary for plaintiff to plead and prove that the defendant knew, or by the exercise of ordinary care could have known, of the unexploded blast causing the accident. This he did plead (Record, p. 29), but this he did not prove.

In the case of

Malone v. Hawley, 46 Cal. 414,

the Supreme Court said:

> "The liability of the defendants depended upon three facts: First, that the method of attaching the hoisting rope to the cage was defective and unsafe, and the injury was caused to the plaintiff by the defect; second, *that the defendants knew, or ought to have known, of the defect;* and third, that the plaintiff did not know of it, and had not equal means of knowledge."

And so in the case of

Sterne v. Mariposa etc. Co., 153 Cal. 522,

the Supreme Court, in affirming the case of *Malone v. Hawley,* said:

> "It was essential to the existence of negligence on the part of the defendant in the matter, not only that the appliance was in fact not a safe appliance for the work, but *also that the defendant, or its representative Maguire, knew, or ought in the exercise of reasonable care for the safety of its employes to have known, that the wrenches furnished were not safe and sufficient.*"

See also

Wright v. Pacific Coast Oil Co., 6 Cal. Unrep. 93;

Pacific Co. v. Johnson, 64 Fed. Rep. 958;

Bone v. Ophir etc. Co. (Cal. 1906), 86 Pac. 685;

Brunell v. Southern Pacific, 34 Ore. 256; 56 Pac. 129.

There is another reason why plaintiff cannot recover in this action, which is this, that the negligence relied on for a recovery, as we have seen, is that defendant failed to provide a reasonably safe place in which deceased was to do his work. The duty that rested upon the defendant in this particular has well defined limitations, and the law relative to that subject, as applicable to the unquestioned facts in the case at bar, is settled by an almost unbroken current of authority. The master's duty to maintain a reasonably safe place of work is applied only where the place is permanent or *quasi* permanent, and it does not apply to such places as are constantly shifting or being transformed as a direct result of the employee's labor and where the work in its progress necessarily changes the character of the place for safety from moment to moment.

The case of

Consolidated Coal & Mining Co. v. Floyd, 51 Oh. St. 542; 25 L. R. A. 854,

is quite similar to that at bar. It was an action to recover damages for death. Clay, the deceased, was employed in mining coal and was killed by the falling upon him of a portion of the roof of the compartment in which he was at work. In the progress of the work it was the duty of a man, Dalton, to post and prop the roof of the mine. The Court says in its opinion

> "It is insisted by the defendant in error that the duty of the defendant company in respect to furnishing a safe working place, was such that it was liable for the negligence of Dalton, irrespective of the question of his incompetency, and of the company's knowledge thereof, and the case was given to the jury by the learned judge of the common pleas upon this theory. Necessarily this view of the law proceeds upon the assumption that Clay and Dalton were not fellow servants, but that, as respects the posting and propping, Dalton was the *alter ego,* of the company, and hence the superior of Clay. The claim is sought to be sustained by a class of cases which hold that the duty of the master to provide a safe working place and machinery for his employes cannot be delegated so as to absolve the master from liability in case of failure of the vice-principal to perform that duty. It does not seem necessary to review these cases. They are, as a rule, based upon the proposition that where the appliance, or place, is one which has been furnished for the work in which the servants are to be engaged, there the duty above stated attaches to the master. We need not discuss this proposition for we have not that case. Here the place was not furnished as in any sense a permanent place of work but was a place in which surrounding conditions were constantly changing, and in-

> stead of being a place furnished by the master for the employes within the spirit of the decisions referred to, was a place the furnishing and preparation of which was in itself part of the work which they were employed to perform."
>
> (A number of cases being cited.)

In the case of

American Bridge Co. v. Seeds, 144 Fed. 605; 11 L. R. A. (N. S.) 1042,

plaintiff was employed in the work of removing an old railroad bridge and in constructing a new one across the Missouri River. In the course of his work he was struck by a piece of iron being hoisted with a fall and tackle, and knocked off the staging erected at the side of the bridge. In reversing a judgment in favor of the plaintiff, the Court, by Judge Sanborn, says:

> "And, finally, the positive duty of the master does not extend to making or keeping a place reasonably safe, where the work is to make a reasonably safe place dangerous or an obviously dangerous place safe, as in blasting rock, tearing down structures, and removing superincumbent masses."

In the case of

Anderson v. Daly Mining Co., 16 Utah 28; 50 Pac. 819,

in which the plaintiff was injured by the explosion of a missed-shot, we find it stated that:

> "While the employer is bound to furnish a safe place for the servant to work in, he is not bound to make it an absolutely safe place; but

> in a place where the nature of the business is such that the conditions are continually changing by reason of the putting in and setting off of blasts, and of continuing excavations in a shaft, and thereby temporarily dangerous conditions arise, the employer cannot be held responsible therefor. * * * The employer was bound to furnish a reasonably safe place and appliances with which to do the work. But where the nature of the business is extremely dangerous, and conditions are necessarily continually changing by reason of placing and setting off blasts, whereby dangerous conditions arise continually through the acts of the servant, without the knowledge of the master, the employer cannot be held responsible therefor without his fault."

The foregoing was quoted with approval in

Shaw v. New Year etc. Co., 31 Mont. 138; 77 Pac. 517,

in which case plaintiff was also injured by the explosion of a missed-shot.

See also

City of Minneapolis v. Lundin, 58 Fed. 529;
Finlayson v. Utica etc. Co., 67 Fed. 510;
Gulf etc. Co. v. Jackson, 65 Fed. 50;
Florence etc. Co. v. Whipps, 138 Fed. 13;
Moon Anchor etc. Mines v. Hopkins, 111 Fed. 303;
Fournier v. Pike, 128 Fed. 993;
Kreigh v. Westinghouse etc. Co., 152 Fed. 120;

Armour v. Hahn, 111 U. S. 313; 28 L. ed. 440;
Poorman etc. Co. v. Devling, 34 Colo. 37; 81 Pac. 252;
Heald v. Wallace, 109 Tenn. 346; 71 S. W. 84;
Holland v. Durham Coal Co., 131 Ga. 715; 63 S. E. 292;
Rolla v. McAlester Coal Co., 6 Ind. Ter. 410; 98 S. W. 141;
Thompson v. California Construction Co., 148 Cal. 39.

It follows, therefore, that under the facts shown by the evidence in this case, there was no duty on the part of the defendant to furnish the deceased with a reasonably safe place in which to do his work. There being no duty, there could be no breach thereof, and plaintiff has no cause of action upon which to base a judgment.

IV.

AS TO ERRORS NOS. 44 AND 45.

The trial Court was requested to charge the jury relative to the law last considered in the preceding point, but refused to do so, the requested charges being as follows:

> "I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or

in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses'' (Record, p. 188).

And again in a modified form:

"It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employee knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers'' (Record, p. 189).

The refusal of the Court to charge the jury in accordance therewith, being assigned as Errors Nos. 44 and 45, respectively.

The argument made and cases cited in the last preceding point fully establish the correctness of the law as set forth in these requests and that the law is applicable to the facts shown by the evidence. The refusal to give the same, therefore, was palpable error.

V.

ERRORS 49 AND 53.

The Court charged the jury in this cause as follows:

> "In this connection, however, you will bear in mind that if you find that the defendant, in operating the mine in question, provided an inspector called a 'missed-hole man', and that it was the duty of such employee to search for and discover missed holes or unexplored blasts, and to explode such blasts, or to report the existence thereof to his superior before the succeeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck tender regularly set at work by his superior at any place where it was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, and to act upon that assumption, and would not be guilty of negligence for failing to make such inspection himself" (Record, pp. 197, 198).

The defendant on its part had requested, but the Court refused, to charge the jury as follows:

> "If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exer-

> cise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant" (Record, pp. 193, 194).

Exception was taken to the giving of the one charge and refusal to give the other.

Aside from defendant's contention that no duty rested upon it to furnish deceased with a reasonably safe place in which to do his work, it was further insisted that the employment of Yokum, the missed-shot man, was an extra precaution, and that such employment did not relieve the miners from their duty of looking for missed-holes, because the examination made by Yokum was frequently incomplete, for the reason that he could not look beneath the muck which he could not remove. This position of defendant was amply supported by evidence. Plaintiff on his part, however, contended otherwise, and there is some evidence in support of his theory. Under these circumstances, it was for the jury to determine, under proper instructions from the Court, what were the true facts, and whether or not, in view of the employment of Yokum, there still remained any duty on the part of Frank Whitsett to look for and discover, if possible, missed-shots while he was employed in the defendant's mine.

The testimony relating to the subject is as follows: The witness Yokum stated that he was hired to bar down, and a day or two later the shift boss gave him orders to look out for missed-holes and shoot them

when he could, otherwise, to have the machine men shoot them; that he had nothing to do with the muck that accumulated on the floor of the drift or cross-cut after a blast. It was his duty, he stated, to examine as far down as he could, which would be down to the muck; that it was not his duty to remove the muck (Record, pp. 111 and 112, 115); that after the muck was cleared away it was the business of the machine men to examine for missed-holes (Record, pp. 116 and 117); that every miner employed by the defendant had to look out for missed-holes (Record, p. 117).

The witness Meyers testified that in every place where he had worked it was the custom for machine men to look out for missed-holes, and that they did so in defendant's mine. He says:

> "That is a thing that is so thoroughly understood among miners that there is no such thing as duty attached to it and no such thing as instructing them concerning it" (Record, p. 109).

Greninger, the foreman, says:

> "It was the duty of all machine men to look for missed-holes, in order to protect themselves in cases where the missed-hole man was not, for any reason, able to find them, either being limited in time or from being covered with muck" (Record, p. 88).

The witness further testified:

> "Q. Then, what was the object of having a missed-hole man?

> A. It was this: We had in this mine many men employed as muckers, not acquainted with powder and would not know it if they saw it. These bar men and missed-hole men were employed by me for the purpose of protecting those men and also leaving the upper part of the face clean, so that a machine could be set up when a machine had finished somewhere else.
>
> My idea in employing the missed-hole men was to protect the inexperienced men."

The witness Thomas testified that he never heard of the employment of a missed-hole man, except upon this occasion; that there is a custom among miners—machine men—to examine for missed-holes (Record, p. 118). Pritchard testified to the same facts, and added that:

> "The business of examining for missed-holes devolves on both the machine man and chuck tender" (Record, p. 119).

And so the witness Davis testified that it is the custom for the miners to look for unexploded blasts or missed-shots, and that it is not customary to place that duty upon a missed-shot man (Record, p. 121). And further, that if there is a missed-hole man employed in a mine, the duty would devolve on both him and the miners to look for missed-holes (Record, p. 123). So the witness Gowing says that it is the custom for the drill operator to investigate or look for missed-shots (Record, p. 124).

On the contrary, Lawrence Whitsett testifies that in big mines he had never heard that it was the

custom for the miner and chuck tender to look out for and discover missed-holes (Record, p. 125). Yet, he says that at different times he discovered and reported missed-shots (Record, p. 65). And Enos Wall testifies in a similar strain (Record, p. 126).

With this conflict in the testimony, it was for the jury to determine the facts as to whether or not the employment of a missed-shot man entirely relieved the miners from their duty to look out for and discover missed-shots, and it was, consequently, error for the trial Judge to charge the jury, as matter of law, that in the event that the defendant provided an inspector, called a missed-hole man, then any driller or chuck tender, regularly set at work at places inspected by such missed-hole man,

> "was entitled to assume that such inspector had done his duty in that regard and to act upon that assumption, and would not be guilty of negligence in failing to make such inspection himself."

Under the charge as given, the jury were left uninformed as to the law to be applied in the event that they found that the employment of Yokum did not relieve Frank Whitsett from his duty to make an inspection for missed-shots. That the jury could very well have found such to be the facts, is evident from the volume of testimony introduced by the defendant in this connection. Proper instructions of the Court in a case of this character must embrace the subject from every angle. The jury should have been told that the defendant could lawfully

place the duty of inspection on the shoulders of both Yokum and Frank Whitsett. This was the theory of the defendant, and, there being evidence to support it, defendant was entitled to have the same submitted to the jury under proper instructions.

People v. Taylor, 36 Cal. 265;
Davis v. Russell, 52 Cal. 615;
Buckley v. Silverberg, 113 Cal. 682;
Walsh et al. v. Tait, 142 Mich. 127; 105 N. W. 544;
Colgrove v. Pickett, 75 Neb. 440; 106 N. W. 453;
Hauber v. Leibold, 76 Neb. 706; 107 N. W. 1044.

If this is a proper subject for instructions under the evidence in the case at bar, the trial Judge could properly have told the jury in effect that if they found from the evidence that the employment of Yokum wholly relieved Frank Whitsett from the duty of looking for missed-shots, then and in that event, said Frank Whitsett was entitled to assume that such inspector had done his duty in that regard and to act upon the assumption, and would not be guilty of negligence in failing to make such inspection himself, whereas, if, on the other hand, they found that the employment of Yokum did not relieve Frank Whitsett from such duty of inspection, then any failure or neglect of said Whitsett to make such an inspection on his own behalf would amount to such contributory negligence as would defeat plaintiff's action.

The error is apparent from another view point. The instruction given was based upon the theory that it was the absolute duty of the defendant to furnish Frank Whitsett with a reasonably safe place in which to do his work. We have seen, however, in the preceding points that this duty of the employer does not apply where the place of work is not permanent or, what may be termed, *quasi* permanent. Where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and where the employee has facilities equal to those of the employer for ascertaining the dangers in the place of work, the employee is under as much obligation as is his employer to be on the lookout for defects or dangers. Consequently, the rule requiring the employer to furnish a reasonably safe place of work is inapplicable. The facts of the case at bar bring it within the exception to the rule. See authorities cited in point III.

From the foregoing, we cannot escape the conclusion that it was error to give the charge complained of and error to refuse the charge requested.

VI.

AS TO ERROR NO. 48.

The trial Court refused to instruct the jury at the request of the defendant as follows, to wit:

> "In the case brought by Reardon, for the death of Frank Whitsett, there is no charge in

> the complaint that the accident was proximately caused by the incompetence of Yokum, or of a missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or, if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed-shot detective, or of the deceased in that case, then your verdict must be for the defendant" (Record, p. 155).

This is a correct statement of the condition of the pleadings and of the law, and it was error for the Court to refuse to so charge the jury.

This case, together with that of Fred Whitsett against the same defendant, was consolidated for the purposes of trial, and, while the two cases arose out of the same accident, the pleadings were different in this respect: In the Reardon case the negligence charged is the failure of the defendant to provide Frank Whitsett with a safe place in which to work (Record, p. 29); in the Fred Whitsett case the defendant was charged with negligence in not providing a safe place in which the plaintiff was to perform his work and also in having in its employ an incompetent inspector or missed-hole man (Record, Fred Whitsett case, No. 2419, pp. 24-25).

Under these pleadings a recovery might be had in one case and none in the other. Yet, the distinction is nowhere pointed out by the trial Judge. He says in his charge:

> "In the case in which Fred Whitsett is plaintiff, the action is prosecuted by that plaintiff, in his own right, to recover for his own benefit compensation for the loss and damage alleged

to have resulted to him through the defendant's negligence in causing the accident counted upon, and the resultant wounds and injuries to his person as set forth in the complaint in that action.

"In the other action in which J. E. Reardon, as administrator of the estate of Frank Whitsett, deceased, is plaintiff, the action is prosecuted by the plaintiff to recover for the benefit of James Whitsett, the father and next of kin of the decedent, damages alleged to have been suffered by the father and mother through the death of the son, resulting, as is alleged, from defendant's negligence in causing the accident in which Frank Whitsett was killed. Such a right of action the law gives under circumstances such as those here alleged.

"As the evidence discloses, and about which there is no dispute, the cause of the injury in both cases, as above indicated, was the same, that is, an accidental explosion in the defendant's mine. That accident is in both instances alleged to have occurred through the defendant's negligence, and therefore the essential element of the cause of action in each case is the negligence of the defendant" * * * (Record, pp. 128, 129).

"This employment gave rise to the relationship known in the law as that of master and servant as then existing between the Whitsetts and the defendant. This fact, and the fact that the injuries sued for in both actions arose out of the same accident or occurrence, renders the principles governing the relations of master and servant, which I am about to state to you, applicable to the rights of the parties to both of the actions involved, and you will so treat them" * * * (Record, pp. 129, 130).

"In other words, a servant, in the absence of agreement to the contrary, has the right to look

> to his employer for the furnishing of a safe place to work, and if the latter, instead of discharging that duty himself sees fit to delegate it to another servant, he does not thereby alter the measure of his own obligation'' (Record, pp. 130, 131).

The distinction between the negligence of an employee, to whom such a duty has been properly delegated, and the incompetency of such an employee, is nowhere pointed out. Defendant contends in both cases that Yokum was a fellow-servant of the Whitsett brothers, the duty of inspection falling equally on him and them.

Further charging the jury, the Court said:

> ''It is alleged in the case of Fred Whitsett that the defendant employed an incompetent man as missed-hole man, and that this fact contributed proximately to that plaintiff's injury. With respect to the duty of the employer to use care in selecting his employees or officers, you will understand that while he must use due care in that regard the employer does not warrant the competency and faithfulness of any one of his employees to the others in his employ. His liability is not of so strict a nature as that. His duty in the matter of employing and retaining and watching over his employees is measured by the same rule of ordinary care and prudence above stated, and if he has selected them with discretion and omitted nothing that prudence dictates in overseeing them, and observing the character of their work, he has done all that the law requires of him. If he has failed in this duty, to the injury of his employee, then he is liable therefor'' (Record, p. 133).

The foregoing quotations are substantially all that is said by the trial Judge, in his charge, upon the subject under consideration. Nowhere is the jury told that in the Reardon case no recovery can be had if the accident was caused by the incompetency of Yokum. That the defendant had the right to have the jury so instructed is beyond question.

See the case of

People v. Taylor, 36 Cal. 265,

and other cases cited with it in the last preceding point.

For these reasons, it is respectfully submitted that this Court correct the errors of the District Court by reversing the judgment complained of and directing a new trial herein.

Dated, San Francisco,
September 19, 1914.

C. H. Wilson,
Attorney for Plaintiff in Error.